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IN THE

Supreme Court of the United States

October Term, 1964.

No. 398.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

v.

JAMES THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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No. 398.

CALMAR STEAMSHIP CORPORATION,
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v.

JAMES THOMPSON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The District Court denied petitioner's motions for judgment n.o.v. or for a new trial by an order and opinion reported as 216 F. Supp. 234. The opinion of the Court of Appeals for the Third Circuit is reported in 331 F. 2d 657. Petition for rehearing before the Court en banc was filed and denied on May 20, 1964.

JURISDICTION.

It is not disputed that there is jurisdiction under Title 28, U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

I. When a member of a longshoremen's gang is engaged in loading steel from a railroad car on the pier into the vessel alongside, by means of the ship's winch and cables, and is injured while moving the cars alongside the vessel:

(a) Is not the vessel rendered unseaworthy under the applicable decisions of this Court, in the *absence of proper equipment* when the cars were moved by a *dangerous and unsafe method,* creating an unreasonable hazard to a member of the longshore gang?

(b) Is not a longshoreman engaged in loading a vessel protected by the warranty of seaworthiness as a matter of law, under the applicable decisions of this court, precluding testimony as to whether loading a vessel is seamen's work?

(c) Has this Court not already settled the question that the application of the maritime law to an injury sustained by a longshoreman on the dock while engaged in loading a vessel is constitutionally proper?

HISTORY OF THE CASE.

Thompson was an integral member of the longshore gang loading steel from freight cars into defendant's vessel, "Alamar", alongside. Part of the gang were on the vessel and part on the pier. Plaintiff was on the pier assigned to attach the ship's hook to the drafts of steel in the freight cars, which thence were hauled up into the ship's holds (28a, 29a). As no shifting engines were available during the late evening and early morning hours, it was necessary to use the ship's bull winch and bull line, to move railroad cars where they could be spotted under the head of the ship's boom (33a, 45a).

At the time plaintiff was injured there were three cars in the vicinity of the ship's No. 1 hatch and three loaded cars in the vicinity of the No. 4 hatch. The first car was empty; the second car had just been emptied and was still under the head of the boom; the third car was heavily loaded with steel and it was this car which had to be moved under the head of the ship's boom (31a). In the absence of proper special equipment for moving the cars, the longshoremen under the surveillance of the ship's ranking officer (185b, 194b) ran a bull line from the bull winch of the ship's No. 3 hatch to car No. 4, and, by surging the winch so that maximum power could be achieved, propelled three loaded cars further down the pier as a battering ram to strike the three cars in the vicinity of the ship's No. 1 hatch so as to drive them forward so that the third loaded car would be "spotted" under the head of the ship's boom for loading into the vessel (33a, 71b, 59a, 53b, 57b, 58b, 24b). This method was successful in starting the cars but, once started there was no control to stop the cars except a man stationed on the car to "brake" it as it came under the ship's boom. Plaintiff was assigned to "brake" the cars (68a). The battering ram hit the car on which plaintiff was standing with such tremendous force that he was knocked

off his perch to the track on the pier where the car wheels passed over and amputated his left leg (70a, 99b).

Qualified experts testified that the propelling of the railroad cars by the ship's cables and winches, as a battering ram, under the circumstances, was a highly dangerous method and that the job could have been done safely with proper equipment, which was not available (86a, 116b, 106a, 107a, 108a).

Petitioner, in the course of the trial, proffered a witness to prove that loading and unloading a vessel was never a seaman's work and, therefore, the warranty of seaworthiness was inapplicable. The Trial Judge held that the work of loading and unloading a vessel was seaman's work as a matter of law and excluded that testimony. The case was submitted to the jury on theories of negligence and unseaworthiness. The jury returned a general verdict in favor of the plaintiff.

REASONS WHY PETITION SHOULD BE DENIED.

I. The Decision of the Court Below in Upholding the Finding of the Jury in Favor of the Respondent That the Vessel Was Unseaworthy Is Not in Conflict With the Decisions of This Court and Other Appellant Courts and Represents a Correct Statement of the Applicable Law.

Plaintiff bottomed his complaint of unseaworthiness on the ground that the vessel had failed to provide proper and safe equipment and employed a dangerous method to "spot" the cars under the head of the ship's boom.

That an improper method of loading or unloading a vessel can render the vessel unseaworthy is now a well-established doctrine. As the opinion of the Court below stated, it was so recognized in *Morales v. City of Galveston*, 370 U. S. 165, 170, 8 L. Ed. 2d 412, 416. Judge Friendly of the Court of Appeals for the Second Circuit specially designated as the Trial Judge and the finder of fact found that an improper and unsafe method of unloading lumber from a vessel rendered that vessel unseaworthy. *Robillard v. A. L. Burbank Co., Ltd.*, 186 F. Supp. 193 (S. D. N. Y., 1960). This case was cited with approval by this Court in *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 214, 10 L. Ed. 2d 303.

Petitioner cites in opposition to this concept, this Court's decision in *United New York and New Jersey Sandy Hook Pilots' Association v. Halecki*, 358 U. S. 613 (1959). Petitioner's reliance on the *Halecki* case is utterly misplaced. In that case the vessel was in a shipyard for its annual overhaul, including specialized spraying of the ship's generators with a highly toxic compound which this Court held was not the work of seamen protected by the warranty of seaworthiness. That case does not stand for the proposition claimed by Petitioner that an unsafe method of operation could not render the vessel unseaworthy.

The other cases cited by petitioner to indicate conflict among the appellate courts are clearly distinguishable in that they related to isolated episodes of negligent use of an otherwise proper tool. In *Arena v. Luckenbach Steamship Co., Inc.*, 279 F. 2d 186 (C. A. 1, 1960), the rolls of paper fell because the nets permanently attached to the pallet or loading tray were not tied. Thus the Court found that the tool utilized was not defective, but that the accident occurred because the longshoreman who loaded this particular pallet had not tied the lanyards of the net. The plaintiff's contention that end-boards could have prevented this accident was rejected by the Court because there was no evidence to support the unavailability of such end-boards. F. 2d 188.

In *Guarracino v. Luckenbach Steamship Co.*, 333 F. 2d 646 (C. A. 2, 1964), the Court of Appeals for the Second Circuit expressly held that its decision in the *Guarracino* case is readily distinguishable from the instant case emanating from the Third Circuit. Guaraccino was injured as he attempted to leave the vessel by climbing over the cargo at the same time that there were fixed and portable ladders available to permit the safe egress from the hatch. As the Court pointed out:

> "The case is readily distinguishable from the recent decisions of the Third Circuit, brought to our attention by libellant's counsel after oral argument, that espouse the view that the longshoremen's negligent use of the ship's equipment to create an unsafe condition may make the ship unseaworthy."[1]

The same distinction would be equally applicable to the other two cases cited by the petitioner, which emanated from the Second Circuit: *Massa v. C. A. Venezuelan Navigacion, et al.*, 332 F. 2d 779 (C. A. 2, 1964) and *Puddu v. Royal Netherlands Steamship Company*, 303 F. 2d 752 (2

1. *Ferrante v. Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964); *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir. 1964).

Cir. 1962), cert. den. 371 U. S. 841. In *Massa* the accident occurred because the longshoreman placed the tongs of the ship's gear in the wrong holes of a pallet. This certainly could not be equated with an improper method of conducting a certain activity.

In the *Puddu* case, the District Judge sitting without a jury, found as a fact that the accident was caused by the manner in which the stevedore gang raised a rain tent so that the falls of the winches were stretched to an angle of almost 180 degrees, which is a maneuver called "high-lining" and which resulted in an unusual and dangerous stress on the boom which was found to be the sole cause of its collapse. Unlike the instant case, there was no contention that the particular tool was unsafe or inadequate. Of the utmost significance in this respect is the fact that the trial judge sat without a jury and his findings, under these circumstances, cannot be reversed unless clearly erroneous. *McAllister v. United States,* 348 U. S. 19, 20, 99 L. Ed. 20 (1954).[2]

Billeci v. United States, 298 F. 2d 703 (C.A. 9, 1962) is also readily distinguishable from the instant case by the same criteria. There was no question in *Billeci* that the proper tool was being utilized but that the operator of the winch had negligently not inserted a locking pin which was the only means by which the boom could be locked into position. When it was not utilized, the hatch board being transported fell. There was no testimony that a locking pin was not available to hold the boom in place. On the contrary, the testimony was that the locking pin was readily available, and because of an isolated episode of negligence, was not so utilized.

Blankenship v. Ellerman's Wilson Line New York, Inc., 265 F. 2d 455 (C. A. 4, 1959), is not applicable because the

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2. It is significant that in another case arising out of the same accident in which Puddu was a victim under the same facts, tried with a jury, the winchman, D'Agosta, recovered and subsequently held a favorable jury verdict on the issue of unseaworthiness. 303 F. 2d 756.

plaintiff contended that there was improper lighting in the holds which contention was rejected by the jury when the jury made an equivocal finding that either the vessel was seaworthy, or that if it was unseaworthy it did not contribute to the accident of the plaintiff.

Edwards v. Steinns, 207 F. 2d 734 (C. A. 4, 1953), cited by the petitioner, stands for the singular proposition that a charge by the Court, that the defendant shipowner could not be held liable if the winch was in good working condition and the accident was caused by the stevedores who operated the winch, was not improper. As a bare proposition of law, it may be somewhat questionable since *Grillea* and *Crumady*.[3] However, to the extent that it refers to an episode of negligence and the use of an otherwise proper tool, it furnishes no basis for conflict with the instant case.

The doctrine of the warranty of seaworthiness was carefully analyzed by the Third Circuit Court of Appeals in *Mesle v. Kea Steamship Corp.*, 260 F. 2d 747, where the Court, after reviewing the many cases on the subject said: ". . . that the ship owner having knowledge, actual or constructive, that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity; liability is imposed for failure to comply with that duty, termed one of making the vessel seaworthy" (p. 751).

II. The Trial Court Properly Excluded Testimony as to the Historical Basis for Extending the Warranty of Seaworthiness to Longshoremen.

The petitioner complains that he has been denied his rights under the Seventh Amendment of the Constitution because the Trial Court refused the testimony relating to

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3. *Grillea v. United States*, 232 F. 2d 919, 1956 AMC 1009 (C. A. 2, 1956); *Crumady v. The Joachim Henarick Fisser*, (1959) 358 U. S. 423, 3 L. ed. 2d 413, 79 S. Ct. 445, 1959 AMC 580.

the historical antecedents of that concept of law which extends the warranty of seaworthiness to longshoremen in the service of the vessel.

In *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 214, 10 L. Ed. 2d 297, 303, 304, and *Hagans v. Ellerman and Bucknall Steamship Co.*, 318 F. 2d 563 (C. A. 3, 1963), this precise question was laid to rest. The warranty of seaworthiness is extended to longshoremen on the pier where the longshoreman is an integral member of the gang loading and unloading the vessel. In the instant case, Thompson was such a member being charged with the responsibility of hooking on the steel in the railroad car to be directly hoisted aboard the vessel.

It is significant to note that the factual situation, in both *Hagans, supra,* and *Gutierrez, supra,* is that the injured longshoreman was not injured by an instrumentality physically affixed to the vessel. It is submitted that the facts of the instant case, where the appellee was injured by an instrumentality so affixed to the vessel and from which it derived its motive power, are much more compelling.

The Jones Act cases cited by the petitioner are inapposite in that they concern themselves with remote factual issues where the nature of the employment was such as to cast doubt on the employees status and raised the question as to whether the individuals involved were members of the crew or harbor workers.

Apart from these rare instances where the seaman's status may be challenged as a matter of fact, as a general rule in the Jones Act cases, the injured party is held to be a member of the crew as a matter of law, *Lawrence v. Norfolk Dredging Company* 319 F. 2d 805, cert. den. 11 L. Ed. 2d 313. So it is with longshoremen engaged in loading and unloading vessels. While so engaged they are "Seamen" as a matter of law, *Seas Shipping Company v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099; *Gutierrez v.*

Waterman S. S. Corp., 373 U. S. 214, 10 L. Ed. 2d 303; *Hagans v. Ellerman and Bucknall Steamship Co.*, 318 F. 2d 563, 571.

Petitioner stresses *Partenweederei, MS Belgrano v. Weigel*, 299 F. 2d 897 (1962) as being to the contrary. An examination of that case leads to a different conclusion. In that case the worker was a pier worker who, the Court said, never came into contact with the ship's tackle and, therefore, was not in the ship's service. This holding has since been clearly overruled by this Court's Decision in *Gutierrez, supra;* but, in any event, the distinction made by the Court in that case makes it inapplicable here since the plaintiff in the instant case was directly concerned with the ship's equipment and, inter alia, was actually engaged in attaching the ship's hook to the steel in the box cars.

In an effort to hoist itself up by its own bootstraps, Petitioner's counsel and the alleged expert who sought to testify that loading and unloading a vessel was never seamen's work, co-authored an article[4] purporting to demonstrate that proposition. They then made the same argument in a legislative inquiry (H. R. 207) charging this Court with adopting a "myth" in holding that loading and unloading a vessel is seamen's work. The hearings on that Bill developed a review of the law which left no question whatever that the work in question has been done by the seamen since the earliest days of merchant shipping. See Merchant Marine and Fisheries committee hearings, 87th Congress, 2nd Session—H. R. 207—Part II, Feb. 20-21, 1962, pages 150 to 154. Petitioner now attempts to use the same argument here and to buttress it with his own article. A review of the reply, as set out in the foregoing legislative inquiry, effectively refutes that argument.

The Court below was clearly correct in excluding the testimony of the "expert" under the circumstances. To

4. 111 Univ. of Penna. Law Review, 1137.

do as Petitioner requested would do incalculable violence to the maritime law.

It is the enlightened rule in the *Sieracki* and *Gutierrez* decisions that petitioners would subvert by their collateral attack upon the accuracy of the historical basis of one of the foundations of those decisions. The observations of this Court need no defense. They rest firmly upon a historical foundation of maritime practice rooted in antiquity and followed throughout the centuries to modern times.

III. The Maritime Law Is Constitutionally Applicable to the Case at Bar.

The situs of a tort of itself will determine whether or not it is maritime. *The Plymouth,* 70 U. S. (3 Wall.) 20, 36, 18 L. Ed. 125 (1865); *State Industrial Comm'n v. Nordenholt Corp.,* 259 U. S. 263, 271, 42 S. Ct. 473, 66 L. Ed. 933 (1922); *Atlantic Transport Co. v. Imbrovek,* 234 U. S. 61.

That there is no constitutional bar to other equally valid concepts of admiralty jurisdiction was firmly set forth in *O'Donnell v. Great Lakes Dredge and Dock Co.,* 318 U. S. 42, 43. The Supreme Court there pointed out that the seaman's cause of action, either as implemented by statute as in the Jones Act (46 U. S. C. A. 688) or non-statutory as in the case of maintenance and cure, is within the admiralty jurisdiction of the courts because such admiralty jurisdiction "depends not on the place where the injury is inflicted but on the nature of the service and its relations ip to the operation of the vessel plying in navigable waters."

The revered Judge Learned Hand, in *Strika v. Netherlands Ministry of Traffic,* 185 F. 2d 555, 557, stated:

> ". . . the defendant argues that since an action upon such an implied warranty is only a tort, the maritime law can have no jurisdiction over a breach of it occurring upon land; that being, of course, an ac-

> cepted constitutional limitation upon maritime law. We should have found this a serious obstacle, were it not for O'Donnell v. Great Lakes Dredge & Dock Co., supra, and the ratio decidendi of Swanson v. Marra Brothers, Inc., supra; but those decisions appear to us to settle it that such a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land. . . ."

While the decision in Strika was not based upon the Extension of Admiralty Jurisdiction Act, 46 U. S. C. 740, Judge Hand points out that this Act should certainly allay all doubts as to the perimeter of admiralty jurisdiction extending beyond the waterline in tort.

Chief Judge Biggs' writing in *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758, cert. den. 375 U. S. 940 stated:

> "Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. In Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 52, 55 S. Ct. 31, 41, 179 L. Ed. 176 (1934), the Supreme Court, by Mr. Chief Justice Hughes, stated: 'We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of Jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters.' See also McGuire v. City of New York, 192 F. Supp. 866, 871 (S. D. N. Y. 1961)."

The instant case acquires jurisdiction under the general maritime law as enunciated by Judge Learned Hand. In addition, the fact that the ship itself was the precipitating factor which catapulted the railroad cars into the car on which plaintiff was standing with the tragic result

would invoke jurisdiction under the Admiralty Extension Act, 46 U. S. C. A. 740. It was the vessel which clearly committed the tort on the pier.

CONCLUSION.

Upon the foregoing considerations, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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